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RPC 1.12:
Conflicts and Former Judges, Arbitrators, and Mediators

By Mark J. Fucile
Fucile & Reising LLP

RPC 1.12 is often called "the former judge rule" because it outlines conflict constraints when a judge leaves the bench for private practice.[1] The rule, however, extends beyond judges to "adjudicative officers,"[2] arbitrators, mediators, and other "third-party neutrals." If not anticipated through conflict checks and associated screening, the broad sweep of the rule has the potential to create "unpleasant surprises" for a law firm if, for example, it is asked to represent a client in a matter handled earlier by a former judge while on the bench who later joined the firm. The "unpleasant surprises" can range from regulatory discipline[3] to disqualification[4]—not to mention unhappy clients if the firm is disqualified or forced to withdraw.

In this column, we'll first survey the conflict constraints in RPC 1.12(a). We'll then discuss proactive steps law firms can take to reasonably anticipate potential conflicts in this context and avoid them through screening under RPC 1.12(c).

Before we do, however, three qualifiers are in order.

First, we'll focus on situations where a law firm member has completed service as a judge, arbitrator, or mediator rather than settings where a law firm member is acting as a part-time or *pro tem* judge or similar position in an ongoing

basis. The former typically involve conflicts between the past service and current matters the law firm is either handling or taking on. The latter, however, usually involve potential conflicts arising from ongoing matters in each role.[5]

Second, we will not examine other roles mediators may take on to document agreements reached or to represent a party after the mediation in the same matter. WSBA Advisory Opinion 201901 (2019) discusses these issues in detail and is available on the WSBA web site.[6]

Third, we will not discuss job negotiations between judges and law firms. RPC 1.12(b) generally prohibits a judge or one of the other positions enumerated in RPC 1.12(a) from negotiating for employment with a party or law firm in the proceeding involved.[7] RPC 1.12(b) also addresses law clerks and generally permits job negotiations with parties or law firms appearing before the clerk's judge as long as the clerk has first informed the judge.[8]

Conflict Constraints

Washington RPC 1.12 is patterned on its ABA Model Rule counterpart and has been a part of Washington's professional rules since 1985.[9] As originally adopted, both the ABA and Washington versions included judges and arbitrators.[10] When the ABA Model Rules and the Washington RPCs were comprehensively updated in the early 2000s, both expanded the scope of the

rule to also include mediators and other "third-party neutrals."[11] A corresponding RPC for limited license legal technicians was adopted in 2015 along with references to LLLTs in the lawyer version of the rule.[12]

RPC 1.12(a) states the nub of the rule:

> [A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.[13]

Comment 1 to RPC 1.12 clarifies that the phrase "participated personally and substantially" does not trigger a conflict if a judge was simply a member of a multi-member court and did not personally handle the matter concerned while on the bench. This same comment also clarifies that a judge who simply exercised administrative responsibility for a court—such as a presiding or chief judge—would not have a conflict if the only connection with the matter concerned was an administrative function such as routinely assigning cases to other judges. Limited actions, such as signing a temporary order or search warrant, may—or may not—constitute "substantial" participation depending on the circumstances.[14]

"Matter" is not defined in RPC 1.12. Comment 1 to RPC 1.12, however, notes that "[t]his Rule generally parallels Rule 1.11[,]" which addresses lateral movement by government lawyers. RPC 1.11(e)(1) defines "matter" as "any

judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter[.]" Although seemingly narrow, Comment 10 to RPC 1.11 notes that "a 'matter' may continue in another form." For example, a former Oregon trial court judge who was disciplined for handling a contempt proceeding over child visitation issues that traced its roots to a dissolution over which the judge had presided seven years before while on the bench.[15]

RPC 1.12(a) includes a waiver mechanism that permits—with the informed consent, confirmed in writing, of *all* of the parties to a proceeding—a former judge (or one of the other positions listed) to subsequently represent one of the parties against the others in continuing facets of the same matter.[16] In practice, however, waivers in this context are usually rare. Human nature suggests, for example, that a party who shared confidential information with a mediator would be understandably reluctant to agree to have the mediator represent the opposing party in the same matter. More commonly, therefore, the former judge (or lawyer in one of the other persons listed) is screened under RPC 1.12(c) that we'll discuss next.

Screening

Assuming that a waiver is unlikely for the reasons just noted, a conflict for a former judge, arbitrator, or mediator is imputed the law firm as a whole under RPC 1.12(c) unless timely screening is implemented:

> (c) If a lawyer or LLLT is disqualified by paragraph (a) of this Rule or LLLT RPC 1.12, no lawyer in a firm with which that lawyer or LLLT is associated may knowingly undertake or continue representation in the matter unless:
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> (1) the disqualified lawyer or LLLT is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

In other words, a conflict is not "just" a problem for the former judge, arbitrator, or mediator. A conflict may lead to their law firm's disqualification from taking on—or continuing—the matter involved. If not caught until a matter is underway, a law firm's disqualification or withdrawal can also create problems with the dislocated client that may lead to fee disputes or other claims.[17] Finally, the unwanted notoriety of either discipline or disqualification can undermine the marketing benefit for the law firm of having a former judge associated with the firm or firm lawyers who are sought out as arbitrators or mediators.

These stark results put a premium on including party information in the firm's conflict system for both matters a former judge handled while on the bench and for arbitration or mediation assignments taken on by law firm lawyers. For former judges, the question often arises: how far back should conflict information go? Unfortunately, there is no hard and fast answer. Some firms with practices that involve "one off" situations such as automobile accidents may be comfortable with only including active cases the judge handled just before leaving the bench. Others with practices where cases can "reappear" later—such as family law—may extend the conflict information much farther back into a judge's tenure on the bench. As noted earlier, for example, the case that caused the Oregon judge to be disciplined traced its roots to a divorce proceeding the judge had presided over seven years before.

Once a conflict is identified, firms should move quickly to implement screening and provide the requisite notice. "Screened" is defined by RPC 1.0A(k) as "the isolation of a lawyer or an LLLT from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or LLLT is obligated to protect[.]" Screening in this context typically includes informing lawyers and staff not to involve the former judge, arbitrator, or mediator

in the matter concerned and establishing internal procedures appropriate to firm size and practice to ensure the screen is maintained.[18] Timely notice of the screen must be provided under RPC 1.12(c)(2) to both the opposing party and the "tribunal" involved. The latter is a defined term under RPC 1.0A(m) and includes both courts and arbitration forums. WSBA Advisory Opinion 190 (1993; amended 2009), in turn, provides practical guidance on segregating related law firm fees for both equity and non-equity owning firm members. If the former judge, arbitrator, or mediator is timely screened as contemplated by RPC 1.12(c), then the conflict will not be imputed to the firm as a whole and others at the firm can accept or continue the work involved.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland

campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

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[1] *See, e.g., State v. Bland*, 90 Wn. App. 677, 680, 953 P.2d 126 (1998) (describing RPC 1.12 as "the former judge rule").

[2] Comment 1 to RPC 1.12 defines the term "adjudicative officer" to include "judges pro tempore, referees, special masters, hearings officers and other parajudicial officers, and also lawyers who serve as part-time judges." *See also* WSBA Advisory Op. 1727 (1997) (including court-appointed guardian ad litem within RPC 1.12(a)).

[3] *See In re Maurer*, 431 P.3d 410 (Or. 2018) (former judge disciplined for handling matter in private practice flowing from earlier matter he presided over on the bench).

[4] *See State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *reversed on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (discussing disqualification under RPC 1.12).

[5] *See, e.g.,* WSBA Advisory Ops. 2140 (2007) (analyzing potential conflict between serving as prosecutor in family law matters while also periodically serving as family law court facilitator) and 2181 (2008) (discussing potential conflict between serving as city attorney prosecuting cases in municipal mental health court while also periodically serving as *pro tem* judge on county's mental health court). *See also* "Application" section of the Washington Code of Judicial Conduct (addressing application of the CJC to part-time and *pro tem* judges).

[6] *See also* WSBA Advisory Ops. 1752 (1997), 202102 (2021) (discussing, in relevant part, mediators documenting resolutions).

[7] "Negotiate for employment" is not defined by RPC 1.12(b). Although addressing job negotiations with a law firm representing a party opponent, ABA Formal Opinion 96-400 (1996) includes a practical discussion of what does and does not ordinarily constitute "job negotiations."

[8] *See also* WSBA Advisory Op. 1073 (1987) (discussing law clerks).

[9] *See generally* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 853-54 (1986) (discussing RPC 1.12 as originally adopted in Washington).

[10] ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 299-308 (2013) (surveying the history of ABA Model Rule 1.12); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 164 (2004) (on file with author) (discussing suggested amendments to the rule that were eventually adopted).

[11] *Id*.

[12] Comment 1 to LLLT RPC 1.12 notes that "Rule 1.12 was adapted from Lawyer RPC 1.12 with no substantive changes." Therefore, this column will focus on the lawyer version of the rule.

[13] RPC 1.12(d) exempts "partisan" members of arbitration panels from the restrictions in RPC 1.12(a).

[14] *Contrast* WSBA Advisory Op. 1373 (1990) (signing temporary restraining order was "substantial participation" under the facts presented) *with State v. Palomares*, 2007 WL 1536939 (Wn. App. May 29, 2007) (unpublished) (signing search warrant was not "substantial participation" under the facts involved). *See also* WSBA Advisory Ops. 2092 (2005) (signing agreed order alone not "substantial participation"), 936 (1985) (same).

[15] *See In re Maurer*, *supra*, 431 P.3d 410.

[16] "Informed consent" and "confirmed in writing" are defined by, respectively, Washington RPCs 1.0(e) and (b).

[17] *See generally Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (casting conflicts as breaches of the fiduciary duty of loyalty and discussing fee disgorgement as a remedy).

[18] *See generally* Mark J. Fucile, *A Useful Tool: Lateral Hire Screening*, Washington State Bar News at 16 (Feb. 2021) (discussing screening under RPC 1.10(e) in the analogous context of lateral movement in private practice).